

## ARTICLE 12432

### REDUCTION IN GRADE AND REMOVAL BASED ON UNACCEPTABLE PERFORMANCE

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## SUBARTICLE 1. GENERAL PROVISIONS

1 1. Authority. The authority for this procedure is found in Title 5 Code of Federal Regulations (CFR) Part 432.

1 2. Purpose. To establish procedures to be used for effecting removal and reduction in grade based solely on unacceptable performance.

1 3. Coverage. This article applies to individuals employed in or under a covered agency as specified in Title 5 CFR Part 432.102(c) except:

- a. An employee of a non-appropriated fund instrumentality.
- b. An employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed.
- c. An administrative law judge.
- d. An individual in the Senior Executive Service (SES).
- e. An individual appointed by the President.
- f. An individual occupying a position not in the competitive service excluded from coverage by regulations of the Office of Personnel Management (OPM).

### 1 4. Definitions

- a. "Activity" means a field installation, headquarters command, or office.
- b. "Critical element" means any requirement of the job which is sufficiently important that inadequate performance of it outweighs acceptable or better performance in other aspects of the job.
- c. "Days" mean calendar days.
- d. "Official" means an employee who has been delegated authority to propose or decide an action under this instruction.
- e. "Opportunity to demonstrate acceptable performance" means a chance for the employee to show that (s)he can meet established minimum performance standards for the critical elements of the job.
- f. "Reasonable time" means an amount of time commensurate with the duties and responsibilities of the employee's job which is sufficient to allow the employee to show whether or not (s)he can meet minimum performance standards.

g. "Reduction in grade" means the involuntary assignment of an employee to a position at a lower classification or job grading level. For purposes of this instruction, a reduction in grade is always to the first step or entry salary level of the grade to which the employee is reduced.

h. "Removal" means the involuntary separation of an employee from employment with an activity except when taken as a reduction-in-force action.

i. "Unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

## 1 5. Exclusions

a. An action initiated under authority of the Special Counsel. (5 United States Code (USC) 1206)

b. An action taken against an administrative law judge. (5 USC 7521)

c. An action taken in the interests of national security. (5 USC 7532)

d. An action taken under a provision of statute, other than one codified in 5 USC, which excepts the action from the provisions of 5 USC.

e. A removal from the SES to a civil service position outside the SES.

f. A reduction-in-force action.

g. A voluntary action initiated by the employee.

h. An adverse action for cause.

i. An action which terminates a temporary promotion within a maximum of 2 years and returns the employee to the position from which the employee was temporarily promoted, or reassigns or demotes the employee to a different position that is not at a lower grade or pay than the position from which the employee was temporarily promoted.

j. An action which terminates a term promotion at the completion of the project or specified period, or at the end of a rotational assignment in excess of 2 years but not more than 5 years, and returns the employee to the position from which promoted or to a different position of equivalent grade and pay.

k. An involuntary retirement because of disability.

l. A termination in accordance with terms specified at the time the appointment was made.

m. An action against a reemployed annuitant.

n. A reduction to the grade previously held by a supervisor or manager who has not completed the supervisory or managerial probationary period.

o. The reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less.

p. The reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

1 6. Delegation of Authority. Delegation of authority to propose and decide reduction in grade and removal under this article should follow the pattern established in Article 12752.

## 1 7. Time of Actions

a. An employee may be reduced in grade or removed at any time during the performance appraisal cycle that the employee's performance in one or more critical elements of the job becomes unacceptable.

b. An advance notice of proposed action may not be given until the employee has been informed of the unacceptable performance on the critical element(s) of the job and been given a reasonable time to demonstrate acceptable performance. The amount of time deemed reasonable may vary depending upon the complexity of the job; however, it should be consistent within similar job categories.

c. No instance of unacceptable performance more than 1 year old at the time of the advance notice may be a basis for a proposed removal or reduction in grade.

d. The decision to retain, reduce in grade, or remove must be made within 30 days after the expiration of the notice period.

e. The decision on a notice of proposed action must be delivered to the employee before the effective date of the action.

## SUBARTICLE 2. PROCEDURES

### 2 1. Advance Notice and Final Decision

a. An employee whose reduction in grade or removal is proposed is entitled to:

(1) Thirty days advance written notice of the proposed action, which identifies:

(a) Specific instances of unacceptable performance by the employee on which the proposed action is based.

(b) The critical element or elements of the employee's position involved in each instance of unacceptable performance.

(c) The name and title of the official designated to hear an oral reply and/or receive the written reply.

(d) The number of days that the employee is allowed to answer orally and in writing.

(2) Be represented by an attorney or other representative.

(3) A reasonable amount of official time to prepare an answer to the advance notice, if the employee is otherwise in an active duty status.

(4) A reasonable time, not less than 7 days, to answer orally and in writing.

(5) A written decision which:

(a) In the case of reduction in grade or removal specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based.

(b) Is signed by an official in a higher position than the official who proposed the action; (if the activity head signed the advance notice, the next higher level of management in chain of command must sign the decision notice).

(c) Specifies the employee's right of appeal to the Merit Systems Protection Board (MSPB) and right, when applicable, to file a grievance under negotiated grievance procedures, but not both.

(d) Provides the time limits for filing an appeal to MSPB, the address of the appropriate Board office for filing the appeal, a copy of the Board's regulations, and a copy of the Board's appeal form which may be obtained from the Human Resources Office (HRO).

b. Notice periods may be extended under Subarticle 2-1a(1) not more than 30 days. An activity may extend this notice period further without prior OPM approval for the following reasons:

(1) To obtain and/or evaluate medical information when the employee has raised a medical issue in the answer to a proposed reduction in grade or removal.

(2) To arrange for the employee's travel to make an oral reply to an appropriate agency official, or the travel of an agency official to hear the employee's oral reply.

(3) To consider the employee's answer if an extension to the period for an answer has been granted (e.g., because of the employee's illness or incapacitation).

(4) To consider reasonable accommodation of a handicapping condition.

(5) If activity procedures so require, to consider positions to which the employee might be reassigned or reduced in grade.

(6) To comply with a stay ordered by a member of the MSPB under 5 USC 1208(b).

c. Employees in receipt of an advance notice may request additional time to respond orally and in writing. The official designated to accept the response may make a decision regarding such request subject to the time limitations set in 1 7d and 2 1b.

d. The agency shall allow an employee who wishes to raise a medical condition, which may have contributed to his or her unacceptable performance to furnish medical documentation, as defined in 5 CFR, of the condition for the activity's consideration. Whenever possible, the employee shall supply this documentation following the activity's notification of unacceptable performance. If the employee offers such documentation after the activity has proposed a reduction in grade or removal, he or she shall supply this information within the time limits allowed for a reply. In considering documentation submitted in connection with the employee's claim of a medical condition, the activity may require or offer a medical examination in accordance with the criteria and procedures of 5 CFR and shall be aware of the obligations which require reasonable accommodation of a qualified disabled employee. If the employee who raises a medical condition has the requisite years of service under the Civil Service Retirement System or the Federal Employees Retirement System, the activity shall provide information concerning application for disability retirement as provided in Article 12830. An employee's application for disability retirement shall not preclude or delay any other appropriate activity decision or personnel action.

e. An employee's choice of representative may be disallowed if such representation would result in a conflict of interest or position, a conflict with the priority needs of the activity, or would give rise to unreasonable cost to the Government. The terms of any applicable bargaining agreement governs representation for employees in an exclusive bargaining unit.

(1) Delegation of authority to make a determination to disallow the choice of an employee's representative should follow the pattern established in Article 12752.

(2) An expedited process for resolving an employee's disagreement with a determination to disallow a choice of representative will follow the pattern established in Article 12752.

2 2. Relationship to Negotiated Agreement. For activities which have unions with exclusive recognition, this Article applies to covered unit employees, except in the case of conflict, then the negotiated agreement will take precedence.

2 3. Role of Human Resources Office (HRO)

a. The HRO will provide advice and guidance to individuals involved in reduction in grade or removal actions based on unacceptable performance.

b. The HRO will maintain records of reductions in grade or removal actions based on unacceptable performance. A case file will be maintained which will include, at a minimum, copies of:

(1) Notice of proposed action.

(2) Employee's written answer, if any.

(3) A summary of the employee's oral reply, if one was made.

(4) Notice of decision and the reasons therefore.

(5) Any supporting material including documentation regarding the opportunity afforded the employee to demonstrate acceptable performance.

All relevant documentation concerning a reduction in grade or removal based on unacceptable performance will be available for review by the affected employee and the employee's representative.

c. The HRO will maintain the record for a minimum of 3 years or until an appeal or complaint arising from an action under this instruction is finally adjudicated, whichever is longer.

d. If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice, any entry or other notation of the unacceptable performance for which the action was proposed shall be removed from any activity record relating to the employee.